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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 265

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

RAY KEITH ATKINSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

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SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

Statement.

From a jury verdict finding respondent permanently and totally disabled from December 1, 1932 (R. 7), because of the permanent loss of hearing of both ears while his contract of United States Government (converted) Insurance was in full force and effect, petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit (R. 91-102)

assigning as error the following instruction (R. 94-95) of the trial court (italics supplied):

> "VIII. The court erred in instructing the jury as follows:
>
> 'And in Clause (a) of said Paragraph 11 of the policy, as relating to total and permanent disability, it is provided as follows: 'Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, *or the loss of hearing of both ears,* or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.' '
>
> 'Therefore, gentlemen of the jury, you are instructed by the Court as a matter of law that, by the terms and provisions of said life insurance policy issued by the defendant, United States of America, to the plaintiff, Ray Keith Atkinson, it is provided that in the event the insured, the plaintiff herein, sustained loss of the hearing of both ears, the same constitutes total and permanent disability under the terms and provisions of said War Risk Insurance Policy'."

The Circuit Court of Appeals affirmed the judgment below, holding that the provisions of Paragraph 11(a) of the contract sued upon was valid, coming within the authority conferred by law and that the decision of this Court in the *Miller* v. *United States,* 294 U. S. 435, affirming the decision of the Fifth Circuit Court of Appeals in that case (71 F. (2d) 361), was inapplicable.

Questions Presented.

1. The United States, in the instant case, contends that there is no authority in law for including in contracts of United States Government Life (converted) Insurance against total permanent disability, the following clause contained in said contracts:

> "the permanent loss of hearing of both ears * * * shall be deemed to be total permanent disability."

2. The United States, in the instant case, contends that the action taken by the District Court and the United States Circuit Court of Appeals for the Fifth Circuit was contrary to the decision of this Court in *Miller* v. *United States,* 294 U. S. 435.

Summary of Argument.

1. PETITIONER'S ATTEMPT TO ESCAPE LIABILITY UPON THE GROUND THAT THERE WAS NO AUTHORITY OF LAW FOR INCLUDING IN CONTRACTS OF UNITED STATES GOVERNMENT LIFE (CONVERTED) INSURANCE AGAINST TOTAL AND PERMANENT DISABILITY THE PROVISION SET FORTH IN THE CONTRACT HEREIN SUED UPON THAT "THE PERMANENT LOSS OF HEARING OF BOTH EARS * * * SHALL BE DEEMED TO BE TOTAL AND PERMANENT DISABILITY" IS UNTENABLE BECAUSE—

(a) THE STATUTE, REGULATIONS, AND THE LEGISLATIVE APPROVAL BY SUBSEQUENT ENACTMENTS OF LAW BY THE NATIONAL CONGRESS CLEARLY SHOWS THAT THIS CLAUSE IS VALID AND BINDING UPON THE RESPONDENT.

(b) PETITIONER IS ATTEMPTING TO "CONTEST" THE INSURANCE CONTRACT SUED UPON WHICH IS SPECIFICALLY FORBIDDEN BY LAW AND THE EXPRESS PROVISIONS OF SAID CONTRACT, AND SUCH ACTION ALSO VIOLATES THE 5TH AMENDMENT TO THE CONSTITUTION.

2. THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DECISION OF THIS COURT IN THE CASE OF *Miller* v. *United States*, 294 U. S. 435, WAS NOT APPLICABLE TO THIS CASE.

ARGUMENT.

(a) The statute, regulations, and the legislative approval by subsequent enactments of law by the National Congress clearly shows that this clause is valid and binding upon the respondent.

Respondent (and some six hundred thousand other citizens up to the close of the fiscal year 1934) obtained from the United States and paid premiums upon contracts of United States Government Life (converted) Insurance[1] containing clauses similar to that which the United States is attacking in this suit[2]. Premiums are being paid today upon hundreds of thousands of these contracts by World War Veterans for the protection covered by the express terms thereof, including the protection which the United States in the present suit seeks to renounce and avoid liability upon by declaring this provision of its solemn written contract to be a nullity.

The contract herein sued upon provides (R. 19-20) (italics supplied):

> "Total permanent disability.—11. Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon condi-

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[1] Report of Administrator of Veterans' Affairs for 1934, p. 29.

[2] See history of these clauses contained in brief of Veterans' Administration filed in this Court in the case of *Miller* v. *United States* (No. 342 October Term, 1934) pp. 12-21.

tions which render it reasonably certain that the total disability will continue throughout the life of the disabled person.. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months shall be refunded without interest.

(a) Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, *or the loss of hearing of both ears,* or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.''

The foregoing provision in this contract is based upon Section 3122 of the Regulations of the United States Veterans' Administration duly issued by the Administrator of Veterans' Affairs, which provides:

''3122. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or of the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.''

The authority for the foregoing provisions of the insurance contract and the above quoted Regulation is found in Title 38, U. S. C. A., Paragraph 512, which provides (italics supplied):

> "Not later than July 2, 1926, all term insurance shall be converted * * * into such forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, * * * in accordance with regulations to be issued by the director, * * * Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid up and extended values, dividends from gains and savings, *and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations.*

The Circuit Court of Appeals (R. 105), like the District Court, held the provisions of the insurance contract sued upon now contested by the Government comes clearly within the foregoing authorization. I respectfully submit it does.

The insurance which was the subject of congressional legislation from 1914 until 1933 was a contract created and existing between the insurer and the insured with respect to the "coverage" or subject matter of the insurance contract. "Total permanent disability" had a fairly well defined and understood meaning not only by reason of general use of the term but also because of judicial construction thereof in sundry cases decided prior to the World War. As a general rule and particularly if the insured is suffering from some affliction within the body, the term is more or less flexible. Certain conditions, however, so generally incapac-

itate those suffering therefrom that reasonable men did not and do not differ on the question of whether such conditions in fact produce "total permanent disability." If it should be conceded that occasionally some very exceptional person, with exceptional mental endowment and exceptional economic opportunity, may possibly produce some income notwithstanding he is totally blind or has lost both legs or one arm and one eye, or has suffered some of the other afflictions indicated in the specific loss provisions of the contract, nevertheless we are dealing with a *practical* and not a theoretical or abstract problem. Congress in express terms gave the person charged with the administration of the War Risk Insurance Act authority to make—

> "*such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time in the regulations.*" (Title 38, U. S. C. A., Paragraph 512.)

It will thus be seen that Congress intended for these contracts to be practicable or practical as well as reasonable; and it is submitted that this "specific loss" provision which the Government is now attacking is both reasonable and practical.

Further, even though the contract itself did not include the so called "specific loss" provision, as it does, the administrative officials could properly adjudicate claims upon the standards indicated by the regulations.

Some standard for the guidance of the subordinates actually doing the rating was and is indispensable. In the last analysis the enumeration of these specific losses, so called, is nothing more nor less than laying down a rule of measurement found by experience to be substantially accurate. That it is incorporated in the contract, in the Regulations

or in certain internal instructions or general orders, is a detail of no importance so far as the principle involved is concerned.

The World War Veterans' Act approved June 7, 1924 (Public No. 242—68th Congress, 43 Stat. 607, 38 U. S. C. A. 193, *et seq.*), provided in Section 301 that all term insurance shall be converted not later than July 3, 1927 into such—

> *"form or forms of insurance as may be prescribed by regulations and as the insured may request."*

It is apparent, therefore, that there is ample statutory authority for the issuance of Section 3122 of the Regulations, United States Veterans' Administration, which prescribes certain "provisions for the protection and advantage of and for alternative benefits to the insured. * * *" 38 U. S. C. A., Paragraph 512.

As was said by this Court in the case of *Wilbur National Bank* v. *United States* in decision rendered February 4, 1935, 79 L. Ed. 402 at page 405:

> "The statutes and regulations which govern the War Risk Insurance Bureau we must assume are known to those who deal with it."

As was said by this Court in the case of *Lynch* v. *United States*, 292 U. S. 571 (78 L. Ed. 1434, at page 1439)—

> *"In order to promote efficiency in administration and justice in the distribution of War Risk Insurance benefits, the Administration was given power to prescribe the form of policies and to make regulations. The form prescribed provided that the policy should be subject to all amendments to the original Act, to all regulations then in force or thereafter adopted."*

The regulations issued by the Director are a part of the contract of insurance under the expressed terms thereof (*White* v. *U. S.*, 270 U. S. 175, 70 L. Ed. 530) and these regu-

lations which are a part of the contract are as binding on the Government as they are upon the veteran. *Lynch* v. *U. S., supra.* The clause in question here was printed on the face of the contract sued on, and was there when the contract was issued to Atkinson, who paid his premiums on the faith of it. So did several hundred thousand others pay their money on the faith of the contract offered them.

Many of the six hundred thousand citizens carrying insurance policies of this character cannot now procure insurance in private corporations because, relying upon the provisions of their government contracts, being no longer insurable risks, they could not now obtain other insurance. It is respectfully submitted that if petitioner's contention is the law of this case, many citizens who have been paying premiums on their contracts for the past fifteen years or more in the confidence which they have had in the promise of their Government will suffer. No private insurance company could possibly hope to repudiate a portion of its contract, as the Government is here attempting. Such attempt, therefore, should not be allowed to succeed unless the law clearly and imperatively requires that result. It clearly does not require, and I insist, does not permit such a dishonest result.

I respectfully submit that, under the settled rule of law, continued administrative interpretations of statutes will be respected and enforced. For the past several years the administrative interpretation has been that the regulations, and provisions of the contract which the Government is now attempting to avoid, have been recognized as valid. This interpretation it is respectfully submitted was correct.

But even if it were believed that the construction of the various statutes by the several officials primarily charged with the duty of construing and administering them over a period of years was erroneous, such construction having

been uniformly given by these various administrative officials and having been applied in hundreds of thousands of cases and incorporated in over half a million contracts now outstanding and in force, it is well settled law that such construction will be adhered to and adopted by the Court, as has been held in many cases. A few citations will suffice.

In the case of *Hahn* v. *United States,* 107 U. S. 402, the Appellant sought to recover a share in certain fines and forfeitures accruing at the Port of New York and his right thereto turned primarily upon the proper construction of a statute enacted in 1867. Under the construction thereof which had been adopted and followed by the Treasury Department, he was not entitled to participate in such fines, etc. This Court approved the reasoning and conclusions of the Court of Claims which emphasized the fact that Congress

> "had not interfrered with such constructions by the Secretary of the Treasury while the Act was in force."

This was in accord with the case of *United States* v. *Pugh,* 99 U. S. 265, wherein this Court in the course of its opinion observed—

> "In the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect."

In *United States* v. *The Alabama Great Southern Railroad Company,* 142 U. S. 615, the controversy involved the proper construction of a statute relating to concession in the price for transporting mails where the carrier had received land grants from the Government. The Post Office Department had construed the statute in a certain manner, which construction was followed from 1876 to 1886 by three

Postmasters General. Then a new Postmaster General sought to change the construction and this Court denied his right so to do and held in favor of the carrier. In the course of the opinion (page 621), it is said (italics supplied):

> "We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that Department; a construction which though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be *ACTED UPON FOR A NUMBER OF YEARS*, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. * * *"

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361 (at 401), this Court clearly indicated that notwithstanding the fact that it might disagree with the construction of the statute in certain particulars, nevertheless, since the rulings had been made by such Commission during "the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the 'Act to Regulate Commerce' is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; * * * We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made

by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, AND HAS BEEN IMPLIEDLY SANCTIONED BY THE REENACTMENT OF THE STATUTE WITHOUT ALTERATION IN THE PARTICULARS CONSTRUED, when not plainly erroneous, must be treated as read into the statute" (page 402).

In *National Lead Company* v. *United States*, 252 U. S. 140, this Court again recognized the binding effect of the administrative construction of a statute extending over a substantial period of time.

Section 13 of the Act of October 6, 1917 (Public No. 90—65th Congress) 40 Stat. 398 provided that the director of the Bureau of War Risk Insurance under the general direction of the Secretary of the Treasury should "administer, execute, and enforce the provisions of this Act and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary OR APPROPRIATE to carry out its PURPOSES, and shall decide all questions arising under the Act, * * *. The director shall adopt reasonable and proper rules to govern the procedure * * * to regulate and provide for the *nature and extent of the proofs and evidence* and the method of taking and furnishing the same in order to establish the right to * * * INSURANCE provided for in this act, * * * and the manner and form of adjudications and awards." (40 Stat. 399.) With some changes in verbiage this is still the law.

Pursuant to such authority the administrative officers did determine the detailed terms of the contracts and among other things provided that any of the enumerated specific losses should constitute a loss insured against by the contract.

Although Congress has legislated on the subject frequently during the past fourteen years, there has been no statute indicating any dissatisfaction of the Congress with

the terms of said contracts so promulgated by the Administrator pursuant to the directions contained in the statutes. There has been no narrowing of the language quoted in any of the thousands of contracts of insurance subsequently issued. Hundreds of claims have been asserted under such contracts, and undoubtedly many are being paid pursuant to administrative determination or in accordance with judgments obtained in the Courts for the "specific losses" set forth in these contracts. These veterans, some of whom were wounded in hostilities have been paid benefits in good faith by the proper administrative officials. If the Government's contention prevails in this case undoubtedly efforts will be made to collect from these seriously disabled veterans the sums heretofore paid them over a period of years pursuant to adjudications by the administrative officials of the Government causing gross injustice and mischievous results.

Congress has legislated time and again upon this subject without disturbing or changing in any way this long continued administrative construction. I respectfully submit that by reason of the legislative history of this matter, Congress, many members of which are World War veterans and undoubtedly hold similar contracts, has approved and adopted and in effect directly authorized the language in dispute with reference to this "specific loss" provision.

Public No. 47, 67th Congress approved August 9, 1921 (42 Stat. 147), created the Veterans' Bureau transferring the duties conferred by the law then being administered by the Bureau of War Risk Insurance to the Veterans' Bureau (42 Stat. 148). Section 404 of this Act relating to the conversion of the term insurance theretofore written *"into such form or forms of insurance as may be prescribed by regulations and as the insured may request."* That was long after the administrative practice in question was well established and it is respectfully submitted that Congress

by this Act expressly approved the existing practice, the "specific loss" provision having become a part of the contract and this approval by Congress had the effect of extending legislative sanction thereto.

Section 300 of the World War Veterans' Act approved June 7, 1924 (Public No. 242—68th Congress, 43 Stat. 607, 38 U. S. Code 193 *et seq.*) relates to insurance and is in substantially the same language as the prior acts, so far as this question is concerned.

Section 301 provides that all term insurance shall be converted not later than July 2, 1927, into such "*form or forms of insurance as may be prescribed by regulations and as the insured may request.*"

Public No. 448 of the 69th Congress, approved July 2, 1926 (44 Stat. 790), amended the World War Veterans' Act in several respects but Section 300 in which is described the disability insured against uses the same words as used throughout viz: "total permanent disability."

Again Congress approved the practice which had been in existence for years and it must be borne in mind that the World War Veterans' Act of 1924 followed extensive hearings and investigations on the entire subject of veterans' relief and veterans' insurance and that Act in effect was a codification of what Congress deemed appropriate after a complete overhauling of all existing legislation on the subject of World War veterans. This is significant, and negatives the thought that there may have been any oversight by the Congress in connection with the present subject.

(b) Petitioner is attempting to "contest" the insurance contract sued upon which is specifically forbidden by law and the express provisions of said contract, and such action also violates the 5th Amendment of the Constitution.

The insurance contract provided that respondent's disabilities were totally and permanently disabling. Peti-

tioner's attack upon the specific provision of contract, it is respectfully submitted, amounts to a "contest" of this contract, which is precluded by statute.

Section 307 of the World War Veterans' Act, as amended by Section 24 of Public 522, approved July 3, 1930 (46 Stat. 991) provides:

> "All contracts or policies of insurance HERETOFORE OR HEREAFTER issued, reinstated, or converted, SHALL BE INCONTESTABLE FROM THE DATE OF ISSUANCE, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces * * * this section shall be deemed to be effective as of April 6, 1917, and APPLICABLE FROM THAT DATE to ALL contracts or policies of insurance."

Formerly Section 307 provided that the insurance should be incontestable "after the insurance *has been in force six months* from the date of issuance or reinstatement * * *," and also that a letter mailed by the Bureau should constitute a contest. This latter provision undoubtedly was incorporated to meet the decision of this Court in *Hurni Packing Company* v. *Mutual Life Insurance Company*, 263 U. S. 167; 68 L. Ed. 235. It was therein held that the contest must be initiated within the period provided in the policy, notwithstanding that death occurred prior to the expiration of such period. But said provision for a letter of contest was eliminated when Section 307 was amended in 1930, as indicated above.

As far as I can discover there is only one decision in the United States directly in point presumably because the conclusion therein indicated is so manifestly correct that counsel for private insurance companies never thought it worthwhile to litigate the question. I refer to *Mutual Reserve Fund Life Association* v. *Austin*, decided by the Circuit Court of Appeals for the First Circuit in December,

1905, 142 Fed. 398. Suit was brought to recover the face amount of a life insurance contract which contained this provision:

> "If this policy of insurance shall have been in continuous force for three years from its date, it shall thereafter be incontestable except for nonpayment of premiums * * * or for misstatement of the age * * *."

It also contained a provision as follows:

> "This contract shall not take effect until this policy is delivered to the member in person during his lifetime and while in good health, nor until the first payment is paid in cash hereon while said member is also in good health."

The undisputed facts in that case showed that the deceased insured was not in good health at the time the contract was delivered to him. He died more than three years after the date thereof. Judgment for plaintiff was affirmed. The Court said (page 401):

> "The term incontestable is of great breadth. It is the policy which is to be incontestable. We think the language broad enough to cover all grounds for contest not specially excepted in that clause. * * * The word policy may well be taken to mean a formal document delivered by the company and containing evidence of an obligation to pay * * *."

It will be observed that Section 307 above provides that "all contracts or policies of insurance * * * shall be incontestable from the date of issuance." Formerly in the 1924 Act the language read: "shall be incontestable after the insurance *has been in force six months* from the date of issuance * * *," practically the same language as in the Austin case cited.

This change in the language in 1930 indicates an intention by the Congress to liberalize the incontestable pro-

vision so as to make it more desirable to the insured. It also is further evidence of Congressional approval of the then existing terms of the insurance "contracts or policies" which had long been in existence pursuant to the administrative officers' determination thereof.

In the case of *Northwestern Mutual Life Insurance Company* v. *Johnson,* 254 U. S. 96, 65 L. Ed. 155, this Court affirmed a judgment for the plaintiff, beneficiary under two life insurance policies. Payment was contested on the ground that the insured committed suicide. The language most favorable to the insurer was:

> "If within two years from the date hereof the said insured shall * * * die by his own hand * * * this policy shall be void."

The other policy provided:

> "This contract shall be incontestable after one year from the date of its issuance provided the required premiums are duly paid."

After pointing out that the case of *Ritter* v. *Insurance Company,* 169 U. S. 139, had been modified by the decision in *Whitefield* v. *Insurance Company,* 205 U. S. 489, this Court, answering a certified question, held the insurer was liable under both contracts. The insured committed suicide at a date more than two years after the first policy and more than one year after the second policy was issued. The Court said:

> "The object of the clause is plain and laudable—to create an absolute assurance of the benefit as free as may be from any dispute of fact except the fact of death and as soon as it can reasonably be done."

It further held that the two quoted clauses were the same in effect and that each policy was incontestable after the period stated therein.

It seems clear that under the express terms of the statutes cited providing that these policies should be incontestable from their dates that it is not now open to the insurer (the United States) to contest the validity of the specific loss provisions thereof. And it will be noted that the incontestable section of the statute is expressly made effective as of April 6, 1917.

This contract constituted property rights. Rights against the United States arising out of contracts with it are protected by the Fifth Amendment to our Constitution.

(*Lynch* v. *U. S.*, 292 U. S. 578, 78 L. Ed. 1444, and cases cited therein.)

When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals. (*Lynch* v. *U. S., supra.*)

As Congress had the power to authorize the Bureau of War Risk Insurance to issue these contracts, the due process clause prohibits the United States from annulling same. As was said by this Court in the case of *Lynch* v. *United States, supra:*

> "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors * * * the United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen." (Citing Sinking Fund cases, 99 U. S. 700, 719, 25 L. Ed. 496, 501).

2. THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DECISION OF THIS COURT IN THE CASE OF *Miller* v. *United States,* 294 U. S. 435, WAS NOT APPLICABLE TO THIS CASE.

The statutory basis for the provision "the permanent loss of hearing of both ears * * * shall be deemed to be total permanent disability" is different in this case from the statutory authority relied on in the *Miller* case for the issuance of a regulation making the provision of the statute relating to compensation applicable to insurance, and retroactively effective. In the *Miller* case, involving yearly renewable war risk term insurance the only statutory basis was that contained in Public No. 522, 71st Congress approved July 3, 1930 (46 Stat. 991) amending Section 5 of the Act of June 7, 1924 and reading—

> "The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and SHALL DECIDE ALL QUESTIONS arising under this Act; and all DECISIONS OF QUESTION OF FACT AND LAW affecting any claimant to the benefits of Titles II, III, or IV SHALL BE CONCLUSIVE except as otherwise provided herein. * * *"

In the instant case, involving United States Government Life (converted) Insurance on a legal reserve self-sustaining basis, the statutory authority for issuing this policy with the "specific loss" provision referred to above, as pointed out by the Circuit Court of Appeals in the instant case (R. 105) was Section 512, U. S. Code Annotated providing—

> **"Not later than July 2, 1926, all term insurance shall be converted * * * into such form or forms of insurance as may be prescribed by regulations and as the insured may request." "Regulations shall provide for the right to convert into ordinary life, etc. * * * and into other usual forms of insurance." "Provisions**

> **for maturity at certain ages and such other provisions for the protection and advantage of and for alternate benefits to the insured and the beneficiaries as may be found to be reasonable and practical may be provided for in the contract of insurance, or from time to time by regulations."**

A comparison of these two statutory provisions, relating to *different* kinds of insurance, will disclose that the statute relating to the regulation referred to in the *Miller* case, *supra,* was a *general* statute; while here the regulation and the policy were issued under a statute specifically referring to and providing for the promulgation of terms of United States Government Life (converted) Insurance only. Also, in the instant case the contract sued on was made *subsequent* to the statutory enactment and issuance of the regulations, and *the contract, containing on its face the specific loss provision, matured after it had been in force for a considerable period of time, with payment of premiums during such period.*

This Court in the *Miller* case was not called upon to and did not in any way consider the above quoted statute, which is applicable only to United States Government Life (converted) Insurance.

The regulation in the *Miller* case was not adopted until eleven years after the insurance policy sued upon had elapsed (or matured) and Miller's cause of action thereon had fully matured, if any he had. There was no longer a contract, but a chose in action in the *Miller* case. This Court is not called upon here to deal with such a situation. Atkinson's *contract contains the language under attack.* He bought it and paid for it with that language in it—one of the "terms and conditions" placed in it by the official designated so to do by the statute.

The insurance contract sued on in the instant case is legal reserve life (and disability) insurance and the premiums paid are deposited in a self-supporting mutual fund in the Treasury, which fund is invested and reinvested in interest bearing obligations. Dividends resulting from this interest and from mortality savings are and have been regularly paid to its policy holders. The following statement by years shows the annual, and the accumulated amount of dividends paid to dates indicated after setting aside the reserve required according to accepted actuarial principles to provide for losses[3].

December 31.	Dividends paid during year indicated.	Accumulated amount dividends paid to date indicated.
1920-21	$ 993,706.92	$ 993,706.92
1923	1,631,103.46	2,624,810.38
1923	2,056,213.06	4,681,023.44
1924	2,585,215.87	7,266,239.31
1925	2,795,372.73	10,061,612.04
1926	3,086,678.49	13,148,290.53
1927	3,846,772.86	16,995,063.39
1928	5,958,383.94	22,953,447.33
1929	6,033,216.41	28,986,663.74
1930	6,903,625.19	35,890,288.93
1931	7,738,296.83	43,628,585.76
1932	7,270,066.72	50,898,652.48
1933	3,420,603.09	54,319,255.57
1934	5,944,589.52	60,263,845.09
1935 (11 Mo.)	5,865,033.01	66,128,878.10

[3]See letter from Frank T. Hines, Administrator of Veterans' Affairs, to Watson B. Miller, Director, National Rehabilitation Committee, The American Legion, dated January 6, 1936, regarding dividends paid on United States Government Life Insurance set forth verbatim in the appendix hereto.

Conclusion.

For the reasons and upon the authorities stated on pages two and three of Respondent's original brief in this Court it is believed Petitioner is precluded from having reviewed the question it presents. But if the question is open to review in this Court the conclusion necessarily must be that: (1) there was legal authority for including in plaintiff's contract of United States Government Life (converted) Insurance against total permanent disability the clause; "* * * the permanent loss of hearing of both ears * * * shall be deemed to be total and permanent disability"; (2) the judgment below in this case is not in conflict with the decision of this Court in the case of *Miller* v. *United States*, 294 U. S. 435; (3) aside from the right to recover on the so called specific loss provision of his contract (the validity of which was not contested in the trial court), the record reflects evidence sufficient to support the verdict and judgment for respondent. The judgment should be affirmed.

WARREN E. MILLER,
Southern Building,
Washington, D. C.,
Counsel for Respondent.

A. H. CULWELL,
JOHN M. WORRELL,
R. A. D. MORTON,
El Paso, Texas.

APPENDIX.

VETERANS ADMINISTRATION, WASHINGTON.

Office of the Administrator of Veterans Affairs

January 6, 1936.

Captain Watson B. Miller,
Director of Rehabilitation,
American Legion,
1608 K Street, N. W.,
Washington, D. C.

MY DEAR CAPTAIN MILLER:

This is in response to your request to be advised the amount paid as dividends on United States Government Life Insurance Policies.

According to the records of the Finance Service of the Veterans' Administration, the amounts paid as dividends on such policies by calendar years (eleven months in 1935 to November 30) and cumulatively to November 30, 1935, are as follows:

December 31.	Dividends paid during year indicated.	Accumulated amount dividends paid to date indicated.
1920-21	$ 993,706.92	$ 993,706.92
1922	1,631,103.46	2,624,810.38
1923	2,056,213.06	4,681,023.44
1924	2,585,215.87	7,266,239.31
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1934	5,944,589.52	60,263,845.09
1935 (11 Mo.)	5,865,033.01	66,128,878.10

Very truly yours,

FRANK T. HINES,
Administrator.